No. 14,424

IN THE

United States Court of Appeals

For the Ninth Circuit

CASH COLE, et al.,
Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,
Appellees.

On Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF OF APPELLANTS.

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JURISDICTION.

The Jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Section 101. The Jurisdiction of the Court of Appeals rests on Section 1291, of the New Federal Judicial Code, and Federal Rules of Civil Procedure.

STATEMENT OF CASE.

Bayview Realty, Inc., was incorporated in September 1949 under the laws of Alaska by the defendants, Everett Nowell and Cash Cole and the wife of Cash

Cole, Ruth M. Cole. Everett Nowell was elected President, Ruth Cole Vice President and Cash Cole Secretary-Treasurer. Cash Cole was, by resolution given full authority to act in all business matters concerning the corporation. (TR 195)

Everett Nowell placed $10,000.00 in Bayview Realty, and Kenneth Kadow, then a special agent for the Department of the Interior for the promotion of housing in Alaska, placed a like amount for the credit of Bayview Realty for which he received a note. (TR 196)

In the meantime Cash Cole had been negotiating with the City of Fairbanks for a lease on city ground for a large housing project and had, after having expended considerable time and money, secured a 75 year lease on said ground.

Cash Cole then began negotiations with the FHA in Juneau, Alaska, for a commitment which was finally granted. (TR 196)

Cash Cole then incorporated Fairview Development, Inc., with Everett Nowell as President, Cliff Mortensen as Vice President and Cash Cole as Secretary-Treasurer. Upon incorporation of Fairview Development, Inc., the lease of land from the City of Fairbanks was put in the name of the corporation. (TR 196-197)

Cash Cole thereupon went to Seattle to complete arrangements with Nelse Mortensen-Alaska, Inc., for the erection of the said housing project. (TR 197)

Bayview Realty, Inc., owned 450 shares of stock in Fairview Development, Inc., which was 50% of the

common capital stock of this corporation representing 50% of the voting stock which stock was owned by Cash Cole and placed in Bayview Realty by him as his contribution to said corporation, representing 15 months of time and expenditure of over $10,000. (TR 199)

Pursuant to negotiations with Nelse Mortensen-Alaska, Inc., Fairview Development, Inc., on July 10, 1950, entered into a written contract with said corporation for the construction of a multiple apartment building on the leasehold estate, owned by Fairview Development, Inc. This apartment building was to be known as Fairview Manor Apartments and Fairview Development, Inc., agreed to pay Nelse Mortensen-Alaska, Inc., $3,080,000.00 for the construction (TR 22-23)

Subsequently Nelse Mortensen-Alaska, Inc., was dissolved and Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, plaintiffs herein, who were all of the directors and stockholders thereof, took possession and control of all of the assets of the corporation and assumed all of the liabilities.

Thus Nelse Mortensen, Cliff Mortensen and Frank Henderson became trustees for the assets of the corporation and are, as trustees, liable for its liabilities.

These individuals are now co-partners doing business as Nelse Mortensen-Alaska Company. (TR 22)

On June 15, 1950, a contract was entered into between Bayview Realty, Inc., Cash Cole and Everett Nowell as parties of the first part and Nelse Mortensen, Cliff Mortensen and Frank Henderson as par-

ties of the second part wherein it was agreed that, upon completion of the housing project, Bayview Realty, Inc., should have the management and operation of the housing project in behalf of Fairview Development, Inc. (TR 24)

A special meeting of the Board of Directors of Fairview Development, Inc., was called on August 3, 1951, for the purpose of effectuating this contract and to enter into a contract for the management of the apartment building.

Accordingly a proper resolution was passed at this meeting, providing that a contract should be executed between Fairview Development, Inc., and Bayview Realty, Inc., whereby Bayview Realty, Inc., would assume the management of Fairview Development, Inc., and that Fairview Development, Inc., would pay Bayview Realty, Inc. 5% of the total income of Fairview Development, Inc., with a minimum guarantee of not less than $2,000.00 per month plus all expenses incurred by Bayview Realty, Inc. It was further decided in this resolution that should Bayview Realty, Inc., be dissolved then the provisions of the contract would apply to Everett Nowell and Cash Cole.

Pursuant to this resolution, a contract, embodying these terms was executed by and between Fairview Development, Inc., and Bayview Realty, Inc., on December 1, 1951. (TR 24-25)

Thereafter Cash Cole and Everett Nowell, acting as officers and directors of Fairview Development, Inc., and as officers and directors of Bayview Realty, Inc., managed Fairview Manor, collecting and disbursing

the rentals, always with the best interests of the project and the corporation in mind.

For such work Cash Cole and Everett Nowell have received a salary, justified by the fact that they were President and Secretary-Treasurer, as well as directors of the corporation, and also by the action of the Board of Directors on August 3, 1951, and the subsequent contract entered into pursuant thereto on December 1, 1951.

Notwithstanding this contract Everett Nowell took himself off the payroll on January 1, 1953, when drastic economies became necessary and consequently Bayview Realty, Inc., owned by Cash Cole and Everett Nowell, received less than the amount specified as the minimum in the contract of December 1, 1951.

Cash Cole and Everett Nowell occupied apartments in Fairview Manor which was necessary for the proper management thereof. This was especially helpful to the corporation as the management was available 24 hours per day and there were many vacant apartments at all times.

In the meantime Nelse Mortensen, Cliff Mortensen and Frank Henderson refused and neglected to pay certain obligations for which they were liable under the contract of July 10, 1950, such as interest on the mortgage in the amount of $18,299.51 and real estate taxes in the amount of $31,612.00. These plaintiffs further neglected to complete the construction of the housing project according to the terms of the contract, but nevertheless received the entire $3,080,000.00. It was therefore necessary that the defendants

make such payments from the assets of Fairview Development, Inc., and also that these defendants spend large sums of money to alleviate the shortcomings in construction in order to make the project suitable for occupancy. (TR 29-30)

On October 31, 1952, the plaintiffs, Fairview Development, Inc., Nelse Mortensen, Cliff Mortensen and Frank Henderson filed suit in the District Court for the Territory of Alaska, Fourth Division against Cash Cole, Everett Nowell and Bayview Realty, Inc., joining therein the First National Bank of Fairbanks and the Bank of Fairbanks.

Plaintiffs alleged in their complaint that the defendants Cash Cole and Everett Nowell had wrongfully usurped possession of the premises of Fairview Manor and had controlled and disbursed the rentals therefrom without authority and without accounting therefore to the plaintiffs. (TR 6)

That the defendants had paid to themselves exorbitant salaries and large expenses without authority and approval by the Board of Fairview Development, Inc.

That the defendants had occupied apartments in Fairview Manor, rent free without authority and that the defendants had failed to account for and to pay to the corporation rents received.

The plaintiffs also allege in their complaint that the defendants have refused to abide by an agreement between the parties, entered into on June 16, 1950, whereby Cash Cole, Everett Nowell and Bayview

Realty, Inc., as parties of the first part and Cliff Mortensen, as party of the second part, agreed that Cliff Mortensen should have one vote as a director of Fairview Development, Inc., and that the defendants, Cash Cole and Everett Nowell, as directors should have one vote together and, further, that, in case of failure of the parties to agree, the matter should be submitted for decision to Kenneth Kadow or, in case he is not available, to Roy Sumpter of Seattle. (TR 15-20)

The plaintiffs pray the defendants, Everett Nowell and Cash Cole, be required to render full accounting, and for a temporary restraining order restraining these defendants from receiving and disbursing any funds of plaintiff, Fairview Development, Inc., and requiring the defendants to vacate their apartments, and further, that these defendants be removed from the management and operation of Fairview Manor.

The plaintiffs further pray for a temporary restraining order restraining the defendants, First National Bank of Fairbanks and Bank of Fairbanks, from disbursing any funds belonging to Fairview Development, Inc.

The plaintiffs also pray for an order, *pendente lite,* appointing a receiver. (TR 3-15)

In their answer the defendants, Cash Cole and Everett Nowell, deny these allegations, stating that they have at all times acted in the best interest of Fairview Development, Inc., and pursuant to agreement and lawful action by its Board of Directors. (TR 15-20)

The trial commenced on October 5, 1953, and included the taking of testimony of Cash Cole on direct examination as an adverse witness for the plaintiffs. On the evening of that day, however, Cash Cole suffered a severe heart attack which caused him to be confined to his bed for an extended period during which time he was suffering severe pain and was under doctor's care and, due to such pain and to various drugs administered by the physician which dilated his eyes and rendered him unable to read, Cash Cole was, during this period, mentally and physically unable to comprehend what was going on and to transact business.

At this time the following litigation was pending involving the several parties which had an important bearing on the present case:

A. G. Rushlight and Co. v. Nelse Mortensen-Alaska, Inc., Fairview Development, Inc., et al., Case No. 7163 in the District Court of Alaska, Fourth Division, to foreclose a mechanic's lien claimed by A. G. Rushlight against Fairview Manor in the sum of $344,-973.30 plus interest and attorneys' fees of $35,000.00 and costs; in which proceeding *Pilip & Butt Painting Contractors* sought to foreclose their claim of mechanic's lien against Fairview Manor in the sum of $77,681.62 with interest and attorneys' fees in the sum of $5,000.00 and costs; and in which proceeding *C. H. Keaton dba Keaton Paint Company* sought to foreclose his claim of lien against Fairview Manor in the sum of $17,339.44 plus interest, attorneys' fees and costs. (TR 69)

Nelse Mortensen-Alaska, Inc., et al. v. A. G. Rushlight & Co., Case No. 3105 in the District Court of the United States for the Western District of Washington, Northern Division. (TR 69-70)

Nelse Mortensen, Cliff Mortensen and Frank Henderson v. Pilip & Butt, Inc., Case No. 442,980 in the Superior Court of the State of Washington for King County. (TR 70)

Fairview Development, Inc. v. Nelse Mortensen-Alaska, Inc., Case No. 3532 in District Court of the United States for the Western District of Washington, Northern Division. (TR 70)

The trial was continued from day to day because of the severe illness of Cash Cole. *On October 8, 1953, Robert Sheldon was appointed receiver of Fairview Manor.* (Emphasis Supplied)

On October 9, 1953, under pressure by reason of the Court's having appointed a receiver and from other pressure shown herein, the stipulation here in controversy was executed by the parties. This stipulation provided, among other things: (a) For the sale of the common stock of Fairview Development, Inc., owned by the Mortensen group, to Cash Cole. (b) Release of all claims against Cash Cole and Fairview Development, Inc. by the Mortensen group in consideration of the payment by Fairview Development, Inc. of $89,000.00. (c) Security for performance by deposit in escrow of all of the common stock, then owned and acquired by Cash Cole, such stock, in event of default, to become the property of the Mortensen

group. (d) Payment by the Mortensen group of $6,800.00 to Nowell and dismissal of litigation involving this claim. (e) Assumption by the Mortensen group of liability for claims of mechanic's lien by Pilip & Butt Painting Contractors and C. H. Keaton. (f) Release to the Mortensen group of the $8,800.00 held on deposit for landscaping in the National Bank of Commerce in Seattle. (g) Dismissal of all pending litigation with prejudice. (h) Resignation of Mortensen and Henderson as officers and directors of Fairview Development, Inc. (i) Agreement for no change in the corporate articles and by-laws and of no incurrence of unusual debts until the $89,000.00 had been paid. (TR 38-44)

The negotiations terminating in the execution of this stipulation were conducted by Nicholas Jaureguy, attorney for Cash Cole and Bayview Realty, Inc., John Hedrick, attorney for Nowell, W. A. Rushlight as representative for A. G. Rushlight, Inc., Joe Diamond, Earle Zinn and Walter Sczudlo, as attorneys for the Mortensen group and Fairview Development, Inc. and other plaintiffs. (TR 235)

The son of Cash Cole was not present at any time during these negotiations after October 6, 1953, and had no knowledge of what was transpiring. (TR 133-134) Neither did Mrs. Ruth Cole take part in any of these negotiations. (TR 141) Cash Cole was, as previously mentioned confined to his bed with a severe heart attack and was physically and mentally incapable of transacting business, unable to read and unable to comprehend the nature or contents of the docu-

ment which he was persuaded to sign due to the representations of W. A. Rushlight purporting to act as a friend. (TR 57-58)

A final judgment approving the stipulation and settlement was entered by the Court on October 10, 1953 (TR 45-46) providing for the discharge of the receiver.

All this time and for some time thereafter Cash Cole, having suffered a severe heart attack, as before mentioned, was unable mentally and physically to transact business or to comprehend anything concerning this stipulation and settlement.

The signature of Cash Cole on this stipulation and on the collateral documents were procured by W. A. Rushlight who gained entrance into Cash Cole's bedroom while he was his house guest and posing as a friend, while Cash Cole was confined to his bed under the influence of certain drugs administered by Dr. Joseph M. Ribar and under orders by Dr. Ribar to have no visitors. (TR 65)

At the same time W. A. Rushlight induced Cash Cole to sign a demand note to A. G. Rushlight Company in the amount of $25,000.00 without any consideration. (TR 57)

W. A. Rushlight did also, under the same circumstances, induce Cash Cole to execute an agreement to pay to Everett Nowell the sum of $45,000.00, also without consideration. (TR 58)

Due to his illness Cash Cole did not ascertain the import and intent of the above mentioned stipulation,

demand note and agreement with Everett Nowell until about one month after the execution of these instruments. (TR 58)

Due to the fact that this stipulation and the collateral documents were obtained from Cash Cole at a time when he was mentally and physically unable to comprehend the import and consequences thereof, that these documents were confiscatory and that the conditions therein contained were impossible to fulfill, Cash Cole, as soon as he was able, filed on January 8, 1954 an amended answer to plaintiff's complaint and a motion to set aside and vacate the stipulation and the judgment based thereon. (TR 47-56)

This motion to set aside was accompanied by affidavits in support thereof from Cash Cole, his son, Tom Cole, and his physician, Dr. Joseph M. Ribar. (TR 56-66)

Affidavits in opposition were filed by Cliff Mortensen, Frank Henderson, Josef Diamond and Earle Zinn of Lycette, Diamond & Sylvester, Everett Nowell, one of the defendants herein who had been paid off pursuant to the stipulation (TR 38-44) and the collateral agreement in favor of Nowell. (TR 54) Also an affidavit by Dr. Ribar (TR 94-95) which in a slight degree contradicts his original affidavit. (TR 64-65)

On February 13, 1954 attorneys for the plaintiffs, Diamond, Zinn, and Sczudlo, filed a motion for the appointment of a receiver until the pending motion to set aside the stipulation and judgment based thereon had been heard and disposed of. (TR 101-103)

On February 23, 1954 Cash Cole, by his attorneys, Warren Taylor and Bell & Sanders, filed a cross complaint in this action, (TR 103-132) alleging therein that the plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank Henderson, acting through their alter ego, Nelse Mortensen-Alaska, Inc., entered into a contract wherein they undertook to perform all the work and to furnish all the material in connection with the construction of Fairview Manor according to plans and specifications. That the Mortensen group, upon dissolution of Nelse Mortensen-Alaska Inc., assumed all of the responsibilities of the contract and the liabilities in connection therewith. That these plaintiffs obtained all of $3,080,000.00 from the cross complainants, (TR 104) and that the plaintiffs failed to comply with the terms of the contract.

The cross complaint then sets out in detail all of the shortcomings and violations by the plaintiffs in connection with the contract, (TR 105-127) alleging that, by reason of these breaches of the contract the cross complainants have been damaged in the sum of $1,214,431.00.

The cross complainants further allege that by reason of the plaintiffs having failed to comply with the terms of the contract, the cross complainants have been forced to spend, in doing what the plaintiffs were obligated to do, the sum of $141,612.15.

As a second cause of action the cross complainants allege that the plaintiffs, during a period from April 1952 to October 1953, by various false affidavits and

representations, had obtained funds from banks in Seattle belonging to the cross complainants. That the plaintiffs had failed to pay the interest on the mortgage as it became due which they were obligated to do under the contract, and that hence, the cross complainants were forced to meet these payments. (TR 128-131)

Affidavits in support of the motion to set aside the judgment and in opposition to the appointment of a receiver were filed by Tom Cole, Ruth Cole, Cash Cole and Allene Hendricks on February 26, 1954 explaining in detail the events prior to and contemporary with this action. (TR 132-163)

Affidavits in opposition were filed by W. A. Rushlight, Everett Nowell, Cliff Mortensen and Frank Henderson on March 9, 1954. (TR 166-170 and 172-183)

On March 19, 1954 the plaintiffs filed an amended motion for the appointment of a receiver, alleging therein that the defendants, Cash Cole and Bayview Realty, Inc. were collecting rents and profits approximating $31,000.00 to $33,000.00 per month. That the property or rents were in danger of being lost and that the acts of the defendants were detrimental to the corporate and individual plaintiffs and that the property of the plaintiffs was in danger of being lost. (TR 183-187)

Affidavits in support of this motion were filed by Everett Nowell and Cliff Mortensen on February 19 and 20, respectively. (TR 187-194)

On April 2, 1954, Cash Cole filed an affidavit in opposition to the appointment of a receiver. (TR 195-214)

The honorable judge found that the defendants, Cash Cole and Bayview Realty Inc. had failed to sustain any ground under Rule 60(b) of the Federal Rules of Civil Procedure on which the Court could set aside or rescind the stipulation or vacate final judgment pursuant thereto. (TR 128-251)

On May 7, 1954 the judge therefore issued an order denying the defendants' motion to vacate final judgment, appointing a receiver and ordering delivery of the certificates of stock. (TR 252-258)

On June 10, 1954, defendant, Cash Cole, filed a motion to strike the name of Fairview Development, Inc. as party plaintiff. (TR 159-160) This motion was denied upon hearing on June 17, 1954.

Notice of appeal was filed by Bell & Sanders and Warren A. Taylor, attorneys for the defendants, on May 10, 1954. (TR 264)

An order was entered on June 4, 1954 setting an appeal cost bond at $1,500.00 or, in lieu thereof, a supersedeas bond, first in the amount of $150,000.00 then raised it to $250,000.00. Also striking the name of Fairview Development Inc. from the notice of appeal.

ARGUMENT AND AUTHORITIES.

I.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN OVERRULING DEFENDANTS' MOTION TO SET ASIDE AND VACATE THE STIPULATION AND JUDGMENT BASED THEREON. (Points 1, 7(b), 7(c))

The motion to set aside and vacate the stipulation and judgment based thereon was made under Rule 60(b), Federal Rules of Civil Procedure which reads as follows:

> "*Rule 60 Relief from Judgment or Order*
> . . . (b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
> . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. . . ."

The stipulation on which the final decree and order, here in controversy, was based was filed on October 9, 1953. (TR 38) The final decree and order pursuant thereto was filed and entered on October 10, 1953. (TR 45) A motion to set aside and vacate the stipulation and judgment based thereon was filed by the Defendants Fairview Development, Inc., Bayview

Realty, Inc. and Cash Cole on January 8, 1954. (TR 52)

> "The action of a trial court in either granting or refusing an application to vacate a judgment is, generally speaking, within the judicial discretion of the court. The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles." *Assman v. Fleming,* 159 F2d 332, at 336.

The Honorable Judge, in his Findings of Fact, in connection with his denial of motion to set aside and vacate the stipulation and judgment based thereon, (TR 252) states, referring to events, subsequent to the first and only day of trial:

> ". . . That evening he (Cash Cole) *purportedly* suffered a heart attack. . . ." (Findings of Fact No. 3, TR 231) (Emphasis added)

And further:

> "On October 8, 1953 Robert E. Sheldon was appointed receiver in this cause for the Fairview Manor and all the assets of the corporate plaintiff, in view of the lack of any settlement on that date, the probable indefinite continuance of the trial and the *purported illness* of Cash Cole." (Findings of Fact No. 4, TR 232) (Emphasis added)

The Appellants contend that these statements by the Court were reversible error.

The testimony throughout the proceedings was uncontradicted to the effect that Cash Cole did, in fact,

suffer a severe heart attack which caused him to be confined to his bed under the care of a physician for an extensive period.

In their motion to set aside the Appellants state as follows:

> "That at the time the stipulation was executed the said Cash Cole was extremely ill, suffering from results of a heart attack which had confined him to his room and bed and incapacitated him to properly think and at a time he was being given drugs by a reputable physician to alleviate his physical suffering, and as a result thereof, he was unable to comprehend and did not know the meaning of said stipulation and signed said stipulation through mistake, inadvertence, surprise, excusable neglect and fraud practised by the prevailing parties." (TR 53)

In his affidavit in support of the motion Appellant, Cash Cole reiterates the above statement and elaborates thereon and in addition states that W. A. Rushlight who was a house guest and who pretended to be a friend induced affiant to sign the said stipulation together with a demand note in favor of A. G. Rushlight Company and an agreement to pay $45,000.00 to Everett Nowell while affiant was unable to comprehend the meaning of these documents. (TR 57-58)

Tom Cole, the son of Appellant, Cash Cole, makes similar assertions in his affidavit in support of the motion. (TR 61-64)

These sworn statements pertaining to the heart attack, suffered by Appellant Cash Cole, were further

supported by affidavits by Joseph M. Ribar, a reputable physician of Fairbanks, Alaska. (TR 64-65 and 94-95)

Dr. Ribar states in his affidavit in support of the motion as follows:

> ". . . That affiant examined said Cash Cole and found his heart condition serious and immediately advised him that under no circumstances could he continue with the trial of the case in which he was a defendant and witness.
>
> Affiant ordered said Cash Cole to remain absolutely quiet and remain in bed until he built up his strength.
>
> That affiant administered drugs, to wit: Demerol, Elixir Donnatal and Aminophylline, Papaverine for the purpose of relieving the pain and relaxing the arteries to ease the strain on his heart.
>
> One of the said drugs has a tendency to dilate the eyes so that vision is so distorted that reading is impossible." (TR 65)

Additional sworn statements to the effect that Appellant, Cash Cole, did, in fact, suffer a severe heart attack may be found in the affidavits in support of motion to set aside judgment and in opposition to motion for appointment of receiver by Cash Cole, (TR 143, at 148) Tom Cole, (TR 132 at 134) and Ruth Cole. (TR 140)

In contrast the Appellants submit that nowhere in the plaintiffs' motions or affidavits do there appear any statements or utterances in contradiction thereto.

The language employed in these several documents does not in any way attempt to deny the illness of Cash Cole.

Affidavit by Cliff Mortensen in opposition to set aside and vacate.

". . . That the undersigned is informed and believes, *and upon such information and belief states the fact to be that that evening said Cash Cole suffered a heart attack, which* purportedly made him physically unable to continue with his testimony as a witness." (TR 66, 26 70) (Emphasis added)

Affidavit by Frank Henderson.

"2. That the undersigned has examined and is familiar with the affidavit executed by Cliff Mortensen in opposition to said motion to set aside and vacate said stipulation and judgment based thereon, filed in this cause, *and by this reference does hereby adopt said affidavit and make the contents thereof a part hereof as if fully set out herein."* (TR 86, 26 87) (Emphasis added)

Affidavit by Everett Nowell.

". . . On or about October 5, following the first day of this matter, *your affiant was informed that Cash Cole had suffered an alleged heart attack.* . . ." (TR 95, at 97) (Emphasis added)

Affidavit by W. A. Rushlight.

". . . That on the evening of October 5, 1953 *your affiant was advised that Cash Cole had suffered a heart attack."* (TR 166) (Emphasis added)

In spite of the fact that the severe heart attack suffered by Appellant, Cash Cole, was thus conclusively documented in the motion to set aside the judgment as well as in the several affidavits in support thereof, as quoted above, and in spite of the fact that none of the plaintiffs, nor Everett Nowell, nor W. A. Rushlight has at any time attempted to deny that Cash Cole did, in fact, suffer a severe heart attack, the Honorable Judge, in his Findings of Fact Nos. 3 and 4, states that Cash Cole "purportedly suffered a heart attack" and refers to Cash Cole's serious illness as a "purported illness", (TR 231, 232) thus casting a doubt on one of the main points on which the Appellants' motion to set aside the judgment rests.

Concerning the discretionary power of the court in deciding in favor of or against a motion to vacate a judgment or decree, the Appellants quote from *Freeman on Judgments,* V. I, Paragraph 292:

> "Any doubt on the facts as to the propriety of setting aside a judgment should be resolved in favor of the application."

And from *Jergins v. Schenk,* 162 Cal. 747, 124 P 426:

> "On an application to open a default, any doubt should be resolved in favor of the application; and, hence an appellate court will be less inclined to reverse an order granting, than one refusing, such an application."

Accord: *Humphreys v. Idaho Gold Mines Development Co.,* 21 Idaho 126, 40 LRA (NS) 817, 120 P 823.

Contrary hereto the Honorable Judge in the present case has created doubt where no doubt existed according to the evidence and has resolved this doubt in favor of the plaintiffs, and against the movant.

II.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 9 THAT CASH COLE TOOK PART IN THE NEGOTIATIONS MENTIONED IN SAID FINDING, WHEREAS THE ONLY MEDICAL TESTIMONY STATES THAT CASH COLE WAS A VERY SICK MAN AND THAT HE WAS SO ILL AT THE TIME OF THE EXECUTION OF THE STIPULATION, THAT HE COULD NOT READ BECAUSE MEDICINE GIVEN TO HIM DILATED HIS EYES AND THAT HE DID NOT KNOW THE INTENT AND IMPORT OF THE DOCUMENTS. (Points 7(e) and 7(g))

The Appellants quote from the Court's Findings of Fact No. 9:

> ". . . Cash Cole participated in them (the negotiations) through his attorney, Jaureguy, and said Rushlight, *and the various compromise plans were submitted from time to time to him personally.*" (TR 236)
>
> "Jaureguy, *Cash Cole* and Rushlight *gave careful consideration to the compromise plan . . .*" (TR 236)
>
> ". . . The interests of these various groups in this case were adverse to each other, and each group, personally or through its attorneys, conducted the negotiations independently for its own benefit, without misrepresentation or opportunity for fraud, or attempt to overreach Cash Cole or any other parties involved for its own advantage *since all phases of said negotiations and proposed*

settlement were known to each of said groups, and to Cash Cole, his son (Tom Cole), his wife and Jaureguy, his attorney who had full possession of all the facts and all of the corporate books of Fairview Development Inc. during this entire period." (TR 236-237) (Emphasis added)

These statements do not conform with the unequivocal denials and assertions contained in Appellants' motion to vacate the judgment and in the several affidavits in support thereof. The Honorable Judge has apparently taken the statements by the plaintiffs without analysis and has chosen to disregard the sworn statements by, or in behalf of, the Appellants; thus arbitrarily siding with the plaintiffs.

In support of these contentions the Appellants quote:

Motion to vacate the judgment, paragraphs (c) and (d).

"(c) That at the time the stipulation was executed the said Cash Cole was extremely ill, suffering from the results of a heart attack which had confined him to his room and bed and incapacitated him to properly think and at a time he was being given drugs by a reputable physician to alleviate his physical suffering, and as a result thereof, he was unable to comprehend and did not know the meaning of said stipulation and signed said stipulation through mistake, inadvertence, surprise, excusable neglect and fraud practised by the prevailing parties.

(d) That the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson acted by and through these agents, including, but not limited

to, the actions of Everett Nowell and W. A. Rushlight who pretended to be good friends of said Cash Cole, and Everett Nowell was an officer of the said corporation and took advantage of the sickened condition of Cash Cole and caused him to enter into said stipulation while sick in bed and unable to read and understand said stipulation and contents of said stipulation were falsely interpreted by the said W. A. Rushlight." (TR 53) Each of them coming out with great sums of money to be paid by Cash Cole, completely showing their adverse interest to Cash Cole.

Affidavit by Cash Cole.

"That affiant was administered certain drugs or medication that affected his eyes to such an extent that he was unable to see, and while in such condition, was prevailed upon to execute the stipulation filed in the above-entitled cause on the 9th day of October 1953.

That while confined to his bed and unable to read, the plaintiffs, acting in concert with one W. A. Rushlight, who was a house guest of affiant and who pretended to be a friend of affiant, induced affiant to sign said stipulation, said affiant not knowing the contents and import of said stipulation, and relied upon the statements of said A. G. Rushlight Company (sic) to the contents thereof which were false and fraudulent." (TR 57)

Affidavits by Tom Cole.

". . . At the time the negotiations were going on, no persons were allowed to visit Cash Cole who was confined to bed with a severe heart at-

tack and was taking drugs which dilated his eyes to such an extent that he could not read, and had to depend upon what was told him by Dick Rushlight . . ." (TR 134)

". . . That for three or four days no one was admitted to see Cash Cole, except affiant, Mrs. Cole and Dr. Ribar, and at no time during this period was any business discussed, as Cash Cole was an extremely sick man, and was not physically or mentally able to do so. Affiant was advised by Dr. Ribar to this effect and it was also very apparent to affiant." (TR 135)

". . . That Cash Cole was unable to read the said instruments for a week after the execution of the same. That no person was ever in the bedroom of Cash Cole long enough to have read the stipulation, agreements and note to him." (TR 137)

". . . That the said W. A. Rushlight, at the time of the execution of the said documents and instruments, well knew that said Cash Cole was in no condition, physically or mentally, to execute the same, and that said Cash Cole did not comprehend the intent and import of said instruments." (TR 62-63)

Affidavits by Joseph M. Ribar, M.D.

". . . Affiant ordered said Cash Cole to remain absolutely quiet and remain in bed until he built up his strength.

That affiant administered drugs, to wit: Demerol, Elixir Donnatal and Aminophylline, Pavarine for the purpose of relieving the pain and relaxing the arteries to ease the strain on his heart. One of said drugs has a tendency to dilate

the eyes so that vision is so distorted that reading is impossible.

Affiant ordered Cash Cole to have no visitors until he had recovered some of his strength.

It is the opinion of affiant that at no time within one week after said heart attack was Cash Cole in a proper physical or mental condition to transact business matters." (TR 65) (Emphasis added)

"That it is the opinion of the affiant that at no time within one week after said heart attack was Cash Cole in a proper physical or mental condition to transact business matters, but I am unable to state whether or not he was mentally competent to transact any business matters after the expiration of seventy-two (72) hours following his attack, that is, after October 7, 1954 (sic), since the patient was not examined to determine his mental competency." (TR 94) (Emphasis added)

These statements are all in accord to the effect that Appellant, Cash Cole was completely unable to transact business in the period during which the negotiations took place and for quite some time after that of the execution of the stipulation.

The only weakness appears in Dr. Ribar's last affidavit, which was procured and filed by plaintiffs, quoted above. (TR 94) It is hard to understand the meaning of this, as Dr. Ribar contradicts himself in his statements contained in the third paragraph thereof. In the first part of this paragraph he states that Cash Cole was physically and mentally unable to

transact business within one week after his heart attack, and in the last part he says that he is unable to state whether or not Cash Cole was mentally competent after the expiration of 72 hours, "as the patient was not examined to determine his mental capacity."

This should, however, not throw any great doubt on the true condition of Cash Cole in view of Dr. Ribar's other statements and of the statements contained in the motion to vacate judgment and in the other affidavits quoted above.

The plaintiffs have presented no testimony contrary to this by any competent physician and rely, in their denials, entirely on their own opinions, some of which are admittedly based on "information and belief" only, while others expressly disclaim any knowledge as to this matter.

Affidavit by Cliff Mortensen.

> ". . . *The undersigned is informed and believes and upon such information and belief states* the fact to be that prior to the execution of said stipulation by said Cash Cole it had been discussed with him in his room at Fairview Manor wth any one or more of the following persons and in their presence . . ." (TR 74-75) (Emphasis added)

Apparently, without any knowledge of his own, as indicated by the above quotation, Cliff Mortensen states:

> "There was no fraud or conspiracy practised or attempted by the plaintiffs or any of them or the

defendant, Everett Nowell or Dick Rushlight, or any one or more of the parties to this cause . . ." (TR 80-81)

"The interests of these various groups in this case were adverse to each other and each group personally or through its attorneys conducted the negotiations independently for its own benefit and without any misrepresentation with respect to any proposed compromise plan, or opportunity for fraud, or to overreach Cash Cole or any other of the parties involved for its own advantage, since all phases of said negotiations and proposed settlement were known to each of said groups, and especially to said Cash Cole, his son, his wife and his attorney, who had full possession of all the facts and all of the corporate books of Fairview Development, Inc. during this entire period." (TR 81)

Plaintiff, Frank V. Henderson, in his affidavit merely adopts Cliff Mortensen's affidavit containing the statements quoted, (TR 87) as do attorneys Joseph Diamond and Earle Zinn. (TR 93)

The Defendant, Everett Nowell, in his affidavit, disclaims any knowledge concerning the condition of Cash Cole:

"From the time that Cash Cole left the Courtroom on October 5, 1953, to the present date, your affiant has not seen, talked to, communicated with, or in any manner had any contact whatsoever with Cash Cole." (TR 97)

". . . How Cash Cole's signature was obtained your affiant has no knowledge." (TR 99)

Affidavit by W. A. Rushlight.

> ". . . Contrary to the statements contained in the affidavits of Cash Cole and Tom Cole and in the motion, not only was Cash Cole fully aware of what was going on, but understood each and every matter contained in said stipulation and all ancillary matters . . ." (TR 170)

On these weak denials the Honorable Judge relies in spite of the conclusive statements by the Appellants to the contrary, some of which statements were given by the only reputable physician familiar with Cash Cole's condition.

It should be noted that the Honorable Judge uses the statement contained in Cliff Mortensen's affidavit (TR 81) verbatim (TR 236-237) as quoted above, in spite of the fact that Cliff Mortensen's knowledge of these matters is, by his own admission, based only upon information and belief. (TR 74-75)

Here again it appears that the doubt, if any, has been resolved in favor of the plaintiffs contrary to the rules as quoted above. *Freeman on Judgments,* V. I, paragraph 292; *Jergins v. Schenk,* 162 Cal. 747, 124 P 426. *Humphreys v. Idaho Gold Mine Dev. Co.* 21 Idaho 126, 40 L.R.A. (NS) 817, 120 P 823. Actually there is no doubt according to the evidence, but virtual certainty that Appellant, Cash Cole, was during the pertinent period, in no condition, physically or mentally, to transact business, and that he did not know the import of the documents which he was imposed upon to sign.

Appellants also submit that W. A. Rushlight, in his affidavit, admits that Cash Cole was unable to read during the period of the negotiations and the execution of the agreement:

> ". . . The more important provisions were read to him in full and the rest were fully explained. . . ." (TR 169)

There would have been no need of reading some of the provisions to Cash Cole and to explain the rest, had he been able to read himself and to comprehend. It is further contended by the Appellants that two of the most important points in the stipulation were probably left unexplained: (1) That the payments offered to Cash Cole by the plaintiffs were to be made by the year while the stipulation provided that these payments had to be made by Cash Cole to the Mortensen group on a quarterly basis; (2) Nothing was explained to Cash Cole about the placing of the stock in escrow.

III.

APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 9, IN THAT THE TESTIMONY SHOWED THAT TOM COLE, RUTH COLE AND JAUREGUY DID NOT PARTICIPATE IN THE NEGOTIATIONS MENTIONED IN SAID FINDING. (Point 7(f))

The Appellants quote from the Court's Findings of Fact No. 9:

> ". . . The negotiations for settlement were conducted by *Nicholas Jaureguy, as attorney for Cash Cole* and Bayview Realty Inc.; John Hed

rick, attorney for Everett Nowell; W. A. Rushlight, acting as representative for A. G. Rushlight & Co.; Joe Diamond, Earle Zinn and Walter Sczudlo, attorneys for Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, and Fairview Development, Inc., and other plaintiffs." (TR 235) (Emphasis added)

The Appellants also refer to excerpts from the Court's Findings of Fact No. 9, quoted above. (Appellants' contention No. II)

In support of Appellants' contention, that the evidence conclusively points to the opposite conclusions, Appellants quote:

Affidavits by Tom Cole.

". . . That at no time was affiant's wife or son, Tom Cole, informed of the matters discussed in the negotiations leading to the execution of the said documents, nor did his attorneys talk with him during said negotiations." (TR 60)

". . . That Nicholas Jaureguy did not work out the settlement . . ." (TR 157)

"Mr. Jaureguy, who represented affiant, did not make the settlement, but advised affiant before he left Fairbanks that it had been done upon the advice of Mr. Cake to Dick Rushlight and that Cake had also advised Rushlight to get possession of Fairview Manor without fail . . ." (TR 162-163)

Affidavits by Tom Cole.

". . . Affiant has read the affidavit of Cliff Mortensen, and in reference to statements contained therein, *denies that affiant was present at*

any conference regarding the settlement of the above entitled cause after the 6th day of October 1953, and had no knowledge of what was transpiring, as Dick Rushlight was doing all the negotiating with the attorneys for plaintiffs, as a purported friend of Cash Cole . . .'' (TR 133-134) (Emphasis added)

''. . . Affiant further states that neither he nor Mrs. Cash Cole had any appreciable knowledge of the contents of the instruments signed by Cash Cole . . .'' (TR 137)

Affidavit by Ruth Cole.

''. . . *That affiant or Tom Cole took no part in said negotiations* nor were they present when Rushlight was talking with my husband over a period of several days . . .'' (TR 141) (Emphasis added)

''. . . *That affiant did not, nor did Tom Cole, participate in the negotiations* which led up to the execution of the documents hereinbefore mentioned.'' (TR 142) (Emphasis added)

In contrast hereto the several affidavits by, or in support of, the plaintiffs contain the following:

Affidavit by Cliff Mortensen.

''. . . Such negotiations were commenced in the jury room adjoining the courtroom on the morning of October 6. There were present at that time said Nicholas Jaureguy, said John E. Hedrick, Tom Cole, the son of Cash Cole, said Everett Nowell, Dick Rushlight, Cliff Mortensen, Frank Henderson, Joe Diamond, Earle Zinn, Walter Sczudlo and one or two other persons who thereafter from time to time and in various other

places participated in said negotiations until they were concluded . . ." (TR 71)

". . . *The undersigned is informed and believes and upon such information and belief states* the fact to be that prior to the execution of said stipulation by said Cash Cole it had been discussed with him in his room at Fairview Manor with any one or more of the followng persons and in their presence: Tom Cole, his son, Mrs. Cash Cole, his wife and Dick Rushlight." (TR 74-75) (Emphasis added)

". . . The negotiations for settlement above mentioned were conducted by Nicholas Jaureguy, attorney for Cash Cole and Bayview Realty, Inc. . . ." (TR 80)

". . . but careful consideration was given by Nicholas Jaureguy, attorney for Cash Cole and ultimately Cash Cole himself . . ." (TR 81)

". . . since all phases of said negotiation and proposed settlement were known to each of said groups and especially to said Cash Cole, his son, his wife and his attorney who had full possession of all of the facts and all of the corporate books of Fairview Development, Inc. during this entire period." (TR 81)

Frank V. Henderson, in his affidavit, adopts the affidavit of Cliff Mortensen containing the above quoted statements, (TR 87) as do the attorneys for the plaintiffs, Josef Diamond and Earle Zinn, in their affidavit. (TR 93)

Affidavit by Everett Nowell.

". . . *During the same period of time your affiant, John Hedrick, W. A. Rushlight, Nicholas Jaureguy carried on the negotiations to sell to Cash Cole affiant's interests and claims in Fairview Development, Inc.* . . . The originals and copies of these contracts and releases were given to Nicholas Jaureguy to obtain the signature of Cash Cole. They were returned to your affiant with Cash Cole's signature thereon. How Cash Cole's signature was obtained your affiant has no knowledge . . ." (TR 99) (Emphasis added)

Affidavit by W. A. Rushlight.

". . . Accordingly *during the course of that day negotiations were carried on* by your affiant and Mr. Jaureguy on behalf of Cash Cole and also by Everett Nowell and his attorney, John Hedrick, with the plaintiffs seeking an offer from them to purchase all of the interests of Cash Cole and Everett Nowell in said project . . ." (TR 167) (Emphasis added)

". . . However, on Friday morning, October 9, when the proposed stipulation had been reduced to writing in its entirety, Mr. Jaureguy and your affiant went to Cole's bedroom and there explained all the provisions of the stipulation. *The more important provisions were read to him in full and the rest were fully explained.* He and his wife, Ruth Cole, agreed to all the terms thereof and signed it . . ." (TR 168-169) (Emphasis added)

Affidavit by Cliff Mortensen and Frank Henderson.

". . . That Tom Cole was present and actively participated in the various negotiations leading

up to the settlement; that, as conceded in said affidavit by Tom Cole, Tom Cole read and was thoroughly conversant with the stipulation which was later executed by Cash Cole and filed herein on October 9, 1953; that the affidavit of Tom Cole is inconsistent in that it states in paragraph 2, Page 4, 'Affiant further states that neither he nor Mrs. Cole had any appreciable knowledge of the contents of the instrument signed by Cash Cole . . .' while in paragraph 2 on page 2, the following statements appear '. . . and affiant advised Dick Rushlight after negotiations were completed that it was utterly impossible to purchase Mortensen's, Henderson's and Nowell's stock on the terms set forth in the agreements. . . .' 'Affiant also informed Mr. Jaureguy, one of Cash Cole's attorneys, that the terms of the agreement were impossible of fulfillment . . .' " (TR 181)

All of the affidavits by, or in behalf of, the Appellants emphatically deny that Tom Cole or Mrs. Cole participated in or had knowledge of what transpired during the negotiations.

The statements by, or in behalf of, the plaintiffs, on the other hand, are far from clear. Cliff Mortensen's affidavit is quite emphatic to the effect that both Tom Cole and Nicholas Jaureguy were present during the first day of the negotiations, but is somewhat vague as to who were present upon subsequent occasions. (TR 71) He states further that Jaureguy conducted the negotiations in behalf of Cash Cole, but does not mention Tom Cole in this respect. (TR 81) Finally he claims that all phases of said negotiations were

known to each of said groups, especially to Cash Cole, his son, his wife, and his attorney.

Frank Henderson and Josef Diamond and Earle Zinn adopt these statements in their affidavits, while Everett Nowell, in contrast, makes no statement as to these negotiations at all, but only claims to have knowledge of negotiations to "sell to Cash Cole affiant's interests and claims in Fairview Development, Inc." which negotiations can, at best, be considered only collateral to the negotiations leading to the settlement.

W. A. Rushlight does not claim that Tom Cole or Ruth Cole were present during the negotiations, not even during the first day, which conflicts with Cliff Mortensen's statements. (TR 167)

Cliff Mortensen and Frank Henderson finally get together to claim that Tom Cole actively participated, but there is still no mention of Mrs. Cole. (TR 181)

These plaintiffs also claim that Tom Cole, in his affidavit, conceded that he had read "and was thoroughly familiar with the stipulation" and that Tom Cole was inconsistent in his statements in that he, in one paragraph, states that neither he nor Mrs. Cole had any appreciable knowledge of the contents of the instrument, while he, in another paragraph, states that he advised Dick Rushlight and Jaureguy to the effect that it was utterly impossible for Cash Cole to meet the terms of the stipulation. (TR 180) The Honorable Judge, in his Findings of Fact No. 11 (TR 237-238) adopts this view, stating further:

"11. Cash Cole contends that his wife and Tom Cole were uninformed of the matters discussed and the final stipulation. In his latter affidavit he points out discussions between Tom Cole and W. A. Rushlight in which familiarity with the terms of the stipulation are shown by the former. Tom Cole denied participation in the negotiations, but admitted that he talked to W. A. Rushlight and to Jaureguy, attorney for Cole, about the final settlement agreement. He does not deny in his affidavits lack of knowledge as to the terms and conditions of the final settlement represented in the stipulation. Ruth Cole denies participation in the negotiations, but does not deny knowledge of the final settlement terms, but rather indicates that she did possess such knowledge." (TR 237-238)

Upon proper analysis there is no conflict in the statements of Tom Cole or Ruth Cole. On the contrary, it would be surprising if neither one of these, even without having participated in the negotiations, would not have gained a broad knowledge of the terms at least enough to realize the impossibility of performance. This does not in any way admit of participation or of anything more than a rough knowledge of the broad outlines of the agreement, the details of which they learned about after the stipulation had been signed.

The Appellants contend that the conflicting representations are to be found, rather, in the statements by, or in behalf of, the plaintiffs, as pointed out above.

IV.

APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT THAT CASH COLE HAD FAILED TO DEPOSIT THE FAIRVIEW DEVELOPMENT, INC. STOCK IN ESCROW AS REQUIRED BY THE STIPULATION AND AGREEMENT. (Point 7(d))

The Honorable Judge, in his Findings of Fact No. 18, states:

> "18. The settlement agreement contained in the stipulation (par. 2, 9) provided that all of the capital stock of Fairview Development, Inc., (except the 100 shares of preferred stock) consisting of 450 shares purchased by said Cash Cole, Nowell and/or Bayview Realty, Inc., from the Mortensens and Henderson under said agreement, and the 450 shares of stock owned by Bayview Realty, Inc., would be placed in escrow, as security for the payment of the sum of $89,000.00 to the Mortensens and Henderson undertaken by Fairview Development, Inc. . . . Cash Cole, Nowell and Bayview Realty, Inc., failed to deliver said stock in escrow for the purpose of said security." (TR 244)

And in Findings of Fact No. 20.

> "20. Bayview Realty, Inc. Cash Cole and Nowell have defaulted under the stipulation and settlement agreement in the performance of the terms and conditions thereof, including (a) failure to deposit all the capital stock of Fairview Development, Inc. (except 100 shares of preferred stock), aggregating 900 shares theretofore owned by said defendants or one or more of them, or acquired under the terms of the settlement agreement, as security for the payment of

the obligation of $89,000.00 undertaken by Fairview Development, Inc. . . .'' (TR 245)

In his affidavit in opposition to the motion to vacate the judgment the plaintiff, Cliff Mortensen states that Cash Cole, Everett Nowell and Bayview Realty, Inc. have refused and failed to deliver said stock in escrow, (TR 78) and states further:

". . . but it was specifically provided that the defendants, Cash Cole, Everett Nowell and/or Bayview Realty, Inc. would secure performance of said undertaking by pledge of all of the stock of said Fairview Development, Inc., as hereinabove stated and more fully set out in said stipulation . . .'' (TR 78-79)

This, the plaintiffs well knew, was a clause impossible of performance, inasmuch as the stock in question was already being held in escrow by Roy Sumpter of Seattle, Washington, a fact which was also well known to the Honorable Judge.

From the affidavit of Appellant, Cash Cole, it may be seen that the plaintiffs also failed to comply with this part of the stipulation as their stock was likewise being held in escrow by said Roy Sumpter:

". . . When the stipulation was signed, the stock was supposed to be turned over to Cash Cole, as the President of Fairview Development, Inc., but although repeated demands have been made for said stock, plaintiffs have protested delivery of said stock to Cash Cole, which stock has heretofore been held in escrow by Roy Sumpter, of the Washington Mortgage Company, Central Building, Seattle, Washington. That when Cash Cole

requested said Roy Sumpter to deliver the stock to him, Josef Diamond, attorney for the plaintiffs, objected although the escrow under which said stock was held had ended, and Cash Cole's stock should have been delivered to him.

Furthermore, Cash Cole was not bound to deliver the stock to plaintiffs, when he ascertained that he had been induced to sign the instruments and note while unable to comprehend the import of said documents." (TR 135-136)

Statements to this effect may also be found in Tom Cole's affidavit:

". . . This stock was placed in escrow, to be delivered when the project was successfully completed; and to date the contract has not been completed, as set forth in the cross complaint on file herein." (TR 160-161)

". . . Mortensen's attorneys have kept the holder of the escrow stock from ever delivering said stock, thereby failing to perform their part of the agreement . . ." (TR 161)

It should be noted that Roy Sumpter was holding the stock in question under an escrow agreement which provided that the stock should be released when the project was completed. Proof of the completion of the project could only be by a letter of acceptance from the FHA and a resolution by the Board of Directors of the corporation. The Mortensen group are not in possession of either instrument, nor to the knowledge of the Appellants have these instruments ever been issued. Roy Sumpter released the stock illegally and this Court had no jurisdiction to order

the release of this stock, nor could it cancel or nullify the original provisions under which Sumpter was holding the stock. It is difficult to understand how Cash Cole could be expected to deliver stock in escrow, pursuant to the agreement, which stock was not in his possession and was being kept from his possession by the plaintiffs.

V.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NOS. 15, 16 AND 17 IN THAT THE LITIGATION DEALT WITH THEREIN WAS NOT A VALID CLAIM AGAINST FAIRVIEW DEVELOPMENT, INC., BUT WAS, IN FACT, OBLIGATIONS OF THE OTHER PLAINTIFFS. (Points 7(i), 7(j), 7(k))

In its findings of Fact No. 17 the Court lists the following additional litigations:

A. G. Rushlight & Co., a corporation, v. Nelse Mortensen-Alaska Inc. a corporation, Fairview Development, Inc. et al., No. 7163.

Nelse Mortensen-Alaska, Inc., a corporation, et al., v. A. G. Rushlight & Co., a corporation, No. 3105.

Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, co-partners dba Nelse Mortensen-Alaska Co., et al., v. Pilip & Butt, Inc., a corporation, et al., No. 44280.

Fairview Development, Inc., a corporation, v. Nelse Mortensen-Alaska, Inc., No. 3532. (TR 243)

In case No. 7163 the following claims of mechanic's and materialman's liens had been filed:

A. G. Rushlight & Co. Inc.—Claim, $344,973.30; attorneys' fees $35,000.00 and costs.

Pilip & Butt Painting Contractors, Inc.—Claim, $77,681.62 and interest accrued thereon; attorneys' fees, $5,000.00 and costs.

C. H. Keaton, dba Keaton Paint Co.—Claim, $17,-349.44, and interest accrued thereon; attorneys' fees, $2,000.00, and costs. (TR 242)

Concerning this litigation the Court states in its Findings of Fact No. 15:

> "15. Cash accepted the benefit of the performance of the terms and conditions of the settlement agreement by the Mortensens and Henderson resulting in the dismissal of the various litigations hereinafter mentioned, payment by them of $125,-000.00 to A. G. Rushlight & Co., in case No. 7163, settlement and payment in the same cause of the claim of Pilip & Butt Contractors, Inc., and release and settlement of other conflicting claims. No restitution has been offered by Cash Cole and Bayview Realty, Inc., or others in their behalf, to place the parties in the same position as they were at the time of the filing of said stipulations on October 9, 1953." (TR 241-242)

If any debts were paid they were the debts of the Mortensens and due under the terms of the contract to be paid by them.

The Appellants contend that the claims involved in the litigations listed above were not valid claims against Fairview Development, Inc., but were obligations of the Mortensen group pursuant to the contract

of July 10, 1950 entered into on that date by the said group and Fairview Development, Inc. (TR 22-23)

These claims, with the attendant litigation, are also listed in the affidavits of Cliff Mortensen, wherein it is clearly stated that said claims concern mechanic's liens by sub-contractors the liability in connection with payment of which would ultimately rest on the Mortensen group. (TR 69-70)

The stipulation, among other things, provided for the payment to the Mortensen Group of $8,800.00 held by the National Bank of Commerce, Seattle, Washington. (TR 41 and 233)

This money was held in escrow by said bank to assure performance under the original contract, (TR 22-23) with respect to landscaping and planting.

The uncontradicted evidence shows that this landscaping was, in fact, never done.

Letter from J. F. Campbell. (Tr. 34-35)

Appellants' Cross Complaint, Second Cause of Action, Paragraph III.

> "Thereafter, and sometime after the 9th day of October, 1953, the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson fraudulently, and through false representation did draw from a bank in Seattle $8,800.00, lawful money of these cross complainants, which money represented the contract price due for landscaping of said apartments when, in truth and in fact, each of the parties, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, knew that the landscaping had not been done and no part thereof had been

done, and therefore wrongfully and fraudulently obtained $8,800.00 from the cross complainants, which money belonged to them; . . ." (TR 129)

Statements to the same effect may be found in affidavits by Appellant, Cash Cole. (TR 144-145 and 157) These statements have at no time been denied by the plaintiffs.

VI.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 1, THAT THERE WAS DISSENSION AND DISCORD AS TO WHO, IN FACT COMPRISED THE DIRECTORATE; THAT THERE WAS IMPROPER DISPOSITION OF CORPORATE FUNDS, IMPAIRMENT OF CORPORATE PROPERTY, USURPATION OF CONTROL AND EXERCISE OF CORPORATE POWERS WITHOUT AUTHORITY. (Point 7(a))

The Appellants contend that there is no evidence to the effect that there was "dissension and discord as to who, in fact, comprised the directorate". On the contrary, the evidence clearly shows that it was at all times entirely clear who comprised the directorate and none of the parties had any doubt thereof.

There was a question as to certain actions by the plaintiff, Cliff Mortensen who, according to Cash Cole, signed his name as president of Fairview Development, Inc. in spite of the fact that Everett Nowell was, up to the time of the execution of the stipulation, the duly elected president.

Affidavit by Cash Cole.

". . . That Cliff Mortensen signed any and all papers that he saw fit as president, and that

Nowell, at no time did anything to affirm his right and duty as president, notwithstanding the fact that affiant protested such procedure to him in front of his attorneys. To the last Cliff Mortensen signed his name as president of the corporation to the final papers releasing all of Fairview's security money for completion of the contract, yet Nowell, as the regularly elected president of the corporation, did nothing to nullify such action . . ." (TR 154-155)

This has not at any time been denied by the plaintiffs and it was expressly admitted by the defendant, Everett Nowell, while denying that he had failed to take steps to stop Cliff Mortensen from signing his name as President.

"That your affiant, Everett Nowell, repeatedly took action to stop Cliff Mortensen from signing any papers as president of Fairview Development, Inc." (TR 176)

This action on the part of Cliff Mortensen could not in any way be construed to show "dissension and discord as to who comprised the directorate" and nowhere in the record does there appear any statement casting any real doubt with respect to the composition of the Board.

There is, in one of Cliff Mortensen's affidavits, a passage which could be construed to state a claim by said Cliff Mortensen that Nelse Mortensen and Frank Henderson were also directors in Fairview Development, Inc.:

"1. That he is one of the plaintiffs in the above entitled cause, and that said cause was filed by

> Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, the undersigned and Frank V. Henderson, individually and as Directors and stockholders of Fairview Development, Inc. . . .'' (TR 66-67)

First, it is doubtful if Cliff Mortensen, by this passage, meant to claim that Nelse Mortensen and Frank Henderson were Directors of Fairview;

Second, this claim, if so it is, has been expressly denied by Cash Cole, who points out that no real doubt as to the falseness of this claim could have existed in the minds of the plaintiffs inasmuch as the minutes of the corporation are plainly explicit as to this matter.

Affidavit by Cash Cole.

> ''Affiant further states, in reply to the affidavit of Cliff Mortensen, on file herein, that the statement in paragraph I of said affidavit are untrue. (sic) *That Frank Henderson and Nelse Mortensen are not and have never been directors of Fairview Development, Inc. as may be verified by the corporation's minute book. . . .''* (TR 159-160) (Emphasis added)

As to the statement of the Court to the effect that there was ''improper disposition of corporate funds'', the Appellants contend that this is wholly an arbitrary finding by the Honorable Judge and that the preponderance of evidence points toward a contrary conclusion.

In the plaintiffs' complaint numerous allegations are set forth concerning alleged misdeeds on the part

of the defendants in the handling of the corporate funds and the corporate property and to the effect that the defendants allegedly usurped control and possession and that they exercised corporate powers without authority of the Board.

These allegations the defendants deny in their answer, and it is submitted that, inasmuch as the trial was never carried beyond the first day and that, consequently the defendants never had an opportunity to present their case and for cross examination these statements stand merely as unproven allegations, and Appellants contend that it was reversible error by the Honorable Judge to adopt said allegations as facts.

An analysis of the Transcript bears out this contention and the evidence contained therein leaves little doubt with respect thereto.

According to affidavit by Cash Cole a contract was entered into by the defendants and the Mortensen group wherein it was agreed that, upon completion of Fairview Manor, Bayview Realty should have the operation and management of said housing project Bayview Realty being a corporation owned by the defendants, Cash Cole and Everett Nowell. (TR 24) This contract was ratified on August 3, 1951 by resolution of the Board of Directors of Fairview Development, Inc. which was, then and up to the time of the execution of the stipulation, comprised of Everett Nowell, Cash Cole and Cliff Mortensen, and an agreement pursuant to this resolution was executed by and between Bayview Realty, Inc. and Fairview Development, Inc. (TR 25)

In said resolution and agreement pursuant thereto Bayview Realty was to receive a fee of five percent of the total income of Fairview Development, Inc. with a minimum guarantee of $2,000.00 per month plus all expenses incurred. (TR 25)

According to affidavit by Appellant, Cash Cole, a firm of certified public accountants was retained through action of the Board of Directors of Fairview Development, Inc. and one of the members of the firm, Herbert Lofquist, himself a certified public accountant, set up an accounting system that has been followed ever since. (TR 26-27)

Defendants, Cash Cole and Everett Nowell, managed the project and received their salaries as per action of the Board of Directors, (TR 25) but on January 1, 1953 Everett Nowell took himself off the payroll as drastic economies were necessary, after which time Fairview Development, Inc. paid less than the $2,000.00 per month agreed upon. (TR 25)

Cash Cole and Everett Nowell occupied apartments in the project which was necessary for the proper management. (TR 28)

As to the allegations by the plaintiffs that the defendants were guilty of the impairment of corporate assets which allegations the Honorable Judge has accepted as facts, a fully satisfactory explanation may be found in the several affidavits and statements by, or in support of, the defendants.

The Mortensen group, according to the contract of July 10, 1950, assumed the liabilities and responsi-

bilities for the construction of the project. The Mortensen group, however, failed to meet these liabilities (TR 29 et seq.) and further failed to complete the construction of said project according to terms and specifications. (TR 29-30)

Appellant, Cash Cole, states:

"18. That in spite of the inadequacies of the construction by the plaintiffs herein individually and further in spite of the fact that they have received the entire $3,080,000.00 for the construction of the project and have failed to pay substantial sums of money required by them to be paid, the management of this project has been carried on in a remarkably efficient and proper manner; in substantiation of this attached hereto is a copy of a letter directed to Fairview Development, Inc., and by this reference made a part hereof. This letter is from J. C. Campbell, Vice-President and manager Mortgage Loan Department, Seattle Trust and Savings Bank, who is servicing the underlying mortgage on the project for Institutional Securities Corporation of New York. One paragraph of the attached letter should be emphasized as follows:

'First I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance but after my examination of the premises and familiarizing myself with the problems which you have had to face one cannot help but admire the management's approach to its problems and its will and determination to correct the deficien-

cies that have developed, for the preservation and continued operation of the project.' " (TR 30-31)

This letter part of which has been quoted above is set out in full in the Transcript on pages 33 to 37, incl.

The Appellants request that the Honorable Court read carefully the defendants' cross complaint wherein the deficiencies in construction have been documented in detail, (TR 103-131) and affidavits by Cash Cole explaining in detail the problems with which the managers of the project were faced. (TR 143-163) The Appellants further refer to affidavit by Allene Hendricks, bookkeeper for Fairview Manor. (TR 171-172)

The records show that $140,000.00 of capital improvements were made and that all operating expenses were paid to date in a period of 2½ years of operation.

These several statements concerning the management of Fairview Manor and the expenditure of funds of Fairview Development, Inc. have never been adequately refuted by the plaintiffs. These plaintiffs have limited themselves to mere allegations and accusations without any attempt of documentation or proof. But in spite thereof the Honorable Judge arbitrarily has taken the point of view of the plaintiffs. In spite of the fact that the plaintiffs have been unable to document their denials of the defendants' statements concerning deficiencies in the construction

as shown in the affidavit by Cliff Mortensen and Frank Henderson, (TR 177-178) the Honorable Judge states as follows:

> "22. The defendants, Cash Cole and Bayview Realty, Inc., have reiterated claims upon which the suit herein before mentioned . . . was based . . . It was based on excessive and unreasonable claims involving purported defects in construction which actually resulted from defective plans and specifications prepared by an architect selected by Cole, and from changes connected with the progress of construction, which were required and authorized by the plaintiff corporation. . . ." (TR 246)

This, the Appellants submit, is a mere statement of opinion arrived at in an arbitrary manner in the teeth of detailed documentation by the defendants and without any semblance of adequate proof on the part of the plaintiffs.

There is nothing any place in the record to show that Cash Cole selected the original architect. It must be kept in mind that there were two different architects concerned with the project; Jerry Fields, the original architect accepted by the Mortensen group and not known by Cole at the time of the acceptance, and the other architect, Jesse Warren, who was employed by Cole on behalf of Fairview Manor to make an investigation of the project as to its completion according to plans and specifications. The plaintiffs have attempted to picture Warren as the man who drew the original specifications while the fact is that

he was the man who wrote the report contained in the cross complaint. (TR 132-33)

As for the statement that the defendants exercised corporate powers without authority of the Board, this also is based on completely undocumented charges, and contrary to the corporation's records.

In their complaint the plaintiffs state as follows:

> "XII. That the defendants, Cash Cole and Everett Nowell, in violation of said agreement have attempted to act for or on behalf of the plaintiff corporation without any authority or right whatsoever, . . . Said defendants have failed and refused to submit matters which could not be settled by the Board of Directors of plaintiff corporation to Ken Kadow, but have entirely ignored the Board of Directors and the stockholders of said corporation. Said defendants, Cash Cole and Everett Nowell, have usurped the authority and powers of the plaintiff corporation and have failed and neglected to call or hold any annual meeting of the stockholders as required by the by-laws of the corporation." (TR 9-10)

The Appellants submit that the minutes of Fairview Development, Inc. show that the required meetings were held and that the defendants acted upon proper authority.

As to failure on the part of the defendants to submit matters on which the Board could not agree, the only instance specified by the plaintiffs (TR 12) has been adequately explained and refuted by the Appellant, Cash Cole. (TR 31-32)

VII.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NOS. 19 AND 20 IN THAT THE STATEMENTS CONTAINED THEREIN, THAT THE MORTENSEN GROUP HAVE FULLY PERFORMED AND THAT CASH COLE AND NOWELL HAVE DEFAULTED UNDER THE TERMS OF THE STIPULATION AND SETTLEMENT ARE MISLEADING AND NOT ACCORDING TO THE EVIDENCE. (Point 7(l), 7(m))

The Mortensen group did not turn over their stock in Fairview Development, Inc. to Cash Cole, as provided for in the stipulation; (TR 38) thus preventing said Cash Cole from placing this stock in escrow together with the Fairview stock owned by Bayview Realty, Inc. This stock, as has been pointed out above, was being held in escrow by Roy Sumpter and its release had been prevented by the attorneys for plaintiffs.

As for the obligations to A. G. Rushlight & Co., Pilip & Butt and C. H. Keaton, these were obligations of the Mortensen group and of no concern to Cash Cole. This has been dealt with in paragraph "V" herein.

The Appellants further contend that the Court erred in its statement in its Findings of Fact No. 20 to the effect that "Bayview Realty, Inc., Cash Cole and Nowell have defaulted under the stipulation and settlement agreement" as Nowell did not join in the motion to set aside the final decree and if there has been any default on his part it has been on the side of the plaintiffs. Nowell, as clearly appears from the evidence, was well paid by the plaintiffs for his part in the conspiracy.

The reason for Cole's default with respect to his failure to place the Fairview stock in escrow has been fully explained under paragraph IV herein.

Concerning the failure of Cash Cole to meet the obligations involving the payment of $89,000.00 as provided for in the stipulation, it is misleading to include this "default" in the Statement of Fact upon which the denial of the motion to set aside the final judgment is based. Appellants, in their motion to set aside the final judgment, and in their various affidavits in support thereof, have clearly stated the impossibility of performance on the part of the Appellants of this stipulation and agreement and the very motion concerns itself with this impossibility and with the fact that the stipulation was obtained by the plaintiffs by fraud, that Cash Cole had been badly overreached and that the plaintiffs had taken advantage of Cash Cole's condition to obtain his signature when he could not read and did not know what he was doing due to his severe illness; all of which is amply supported by the evidence.

Under these circumstances the Appellants had no duty whatsoever to perform under the fraudulently obtained stipulation and agreement.

VIII.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 21 IN THAT THE REFERENCES CONTAINED IN THE AFFIDAVITS OF THE APPELLANTS, CONCERNING THE FINANCIAL CONDITION OF FAIRVIEW MANOR AND THE PLAINTIFFS' KNOWLEDGE THEREOF, AND CONCERNING THE SEPARATE NEGOTIATIONS AND AGREEMENTS, WERE MATTERS INTIMATELY CONNECTED WITH THE STIPULATION AND AGREEMENT AND UPON WHICH SAID STIPULATION DEPENDED IN PART. (Point 7(m))

Contrary to the opinion expressed by the Honorable Judge, the Appellants contend that knowledge by the plaintiffs concerning the financial condition of Fairview Manor is directly relevant to the issues raised by the motions.

The stipulation provides as follows:

> ". . . and in consideration of such release and discharge of all liability, *Fairview Development, Inc., agrees to pay* to Nelse Mortensen, Cliff Mortensen and Frank Henderson, the sum of Eighty-nine Thousand Dollars ($89,000.00) without interest, as herein provided. . . ." (TR 38)

In view of the above it is hard to understand how the Honorable Judge can arrive at the conclusion that the financial condition of Fairview Manor, the sole asset of Fairview Development, Inc., is irrelevant to the issues.

The Appellants contend, and it is part of their contentions on which the motion to set aside the stipulation and the judgment based thereon is based, that the plaintiffs not only knew, at the time of the execution of the stipulation, that Cash Cole was in-

capable of doing business and did not know what he was doing, but also that the plaintiffs well knew that the stipulation was impossible of performance.

True, the stipulation provided that Cash Cole secure the payment by Fairview Development, Inc., but the plaintiffs knew that the sole income of Cash Cole was derived from Fairview Manor and Fairview Development, Inc. and hence the question of the plaintiffs' knowledge in connection therewith was not only relevant to, but is actually one of, the issues involved.

Appellant, Cash Cole, states that the plaintiffs well knew that the payments by Fairview Development, Inc. provided for in the stipulation, were impossible to meet and that all the plaintiffs had access to the books of the corporation and knew the income from rentals and the payments required by the mortgage and the ordinary expenses. (TR 59) Statements to the same effect may be found in affidavits by Tom Cole, (TR 63) who further states that he advised Dick Rushlight to that effect. (TR 134)

The Appellants further contend that the matters concerning the separate agreement with Nowell and the note to Rushlight are matters relevant to the issues raised and very much to the point.

The said agreement and note were procured at the same time and under the same conditions and circumstances as those under which the stipulation was procured, and these matters were, from the beginning inextricably a part of the general scheme to defraud Cash Cole, as the evidence amply shows and has been

pointed out above. Without the help of Dick Rushlight and of Everett Nowell, who was originally himself a defendant, but apparently who joined with the plaintiffs and came out with a fine settlement, this scheme could not have been carried to its successful conclusion.

Rushlight had been paid all but $50,000.00 of his contract prior, yet he arranged the settlement under which he got $125,000.00 from the Mortensen group and a note for $25,000.00 from Fairview Manor, which amounts to $100,000.00 more than his original contract. (TR 157)

Refusal by the Honorable Judge to consider these matters as part of the Appellants' proof of the fraud perpetrated upon them was arbitrary and prejudicial error.

IX.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 22 IN THAT THERE WAS NO EVIDENCE THAT CAUSE NO. 3532 WAS DISMISSED AND THAT NELSE MORTENSEN ALASKA CO. IS NOT A PARTY TO THIS SUIT AND ANY DISMISSAL IN THAT CAUSE WOULD NOT PREJUDICE THE DEFENDANTS IN THIS CAUSE. (Point 7(o))

The Court states that this suit is based on "excessive and unreasonable claims". (TR 246) These claims have been fully explained in the Appellants' various affidavits and have been set out in detail in the cross complaint, and never denied and should have been accepted as the truth. (TR 103-131)

The Court further states:

> "It was based on excessive and unreasonable claims involving purported defects in construction *which actually resulted from defective plans and specifications prepared by an architect selected by Cole, and from changes connected with the progress of construction, which were required and authorized by the plaintiff corporation.*" (TR 246) (Emphasis added)

Of this opinion there is no proof as the question has not been litigated. Against the bare allegations to this effect stands however, the detailed documentation contained in the cross complaint (TR 103-131) and this whole matter has further been brought out and explained in the various affidavits by and in behalf of the Appellants.

X.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 23 IN THAT THE FINDING IS CONTRARY TO THE EVIDENCE. (Point 7(p))

In its Findings of Fact No. 23 the Court states as follows:

> "The purpose of this suit filed by the plaintiffs was to resolve the deadlock in the conduct and affairs of the plaintiff corporation, due to the failure of the board of directors to proceed, to resolve the deadlock among the stockholders and members of said board *resulting of paralysis of corporate functions, to end the dissension and discord in said board, to eliminate mismanagement and improper disposition of funds and dis-*

sipation of assets and impairment of corporate property by the principal defendants." (TR 247) (Emphasis added)

The Honorable Judge here adopts as facts the mere allegations by the plaintiffs; allegations which have not been litigated and for which there appears no satisfactory evidence while the Appellants have provided ample evidence to the effect that the management has been, in all respects, efficient and that all the shortcomings and difficulties encountered were solely due to the failure of the plaintiffs to properly perform.

> "The proceedings at the trial and the deposition taken theretofore of Cash Cole, and the affidavits filed herein showed many improper acts in management by Cash Cole and members of his family and Nowell: . . ."

The Appellants contend that the testimony given by Cash Cole during the trial was not competent evidence and it was reversible error for the Honorable Judge to consider this testimony in denying the Appellants' motion to vacate the judgment. Cash Cole was called as an adverse witness by the plaintiffs and testified on direct examination. No opportunity for cross examination was afforded the defendants as Cash Cole on the night of the first day of trial suffered a severe heart attack and was unable to attend further. The plaintiffs could not be expected to bring out any of the good of Cash Cole and his side of the story was never touched upon at the hearing.

Evidence from a former trial is never admissible in a subsequent trial if there has been no opportunity for cross-examination.

American Jurisprudence, Evidence, paragraph 695;

Corpus Juris Secundum, Evidence, paragraph 390.

There was no subsequent trial here, but the same rule would prevail, as here Cash Cole's testimony would, of necessity, be completely misleading because no opportunity was afforded him to be cross examined as to these matters.

The "improper acts" enumerated by the Honorable Judge are mere allegations by the plaintiffs which have been arbitrarily adopted as facts contrary to the competent evidence.

The purchase of auto parts for Tom Cole has been explained by Cash Cole as an accommodation extended to the employees of Fairview Manor in order to take advantage of wholesale rates for which Fairview Manor has been paid back. (TR 149) It should further be noted that Tom Cole's truck was sometimes used for hauling for the project.

The Appellants further state that Cash Cole's daughter-in-law received a message that her mother in Kansas was dying an hour or two before the departure of the night plane. The charge for the fare was made to Fairview Manor and later paid for by Tom Cole, her husband, Assistant Manager of Fairview. The record shows that this was paid as per the signature of the receiver.

The telephone calls of which the plaintiffs complain were in the regular line of business at the time when $140,000.00 worth of improvements were being made and during the continuous conferences with lawyers trying to defend the property rights against the Mortensen group and their numerous wrong doings.

The bar referred to is a simple counter with built-in stools, to use in place of a table and chairs for eating. In Mr. Nowell's absence this apartment was rented at $14.00 per night when in use as an emergency apartment. (TR 28)

The payment to Nowell of $1,000.00 per month could not rightly be considered an improper act in view of the contract between Bayview Realty, Inc., and Fairview Development, Inc., providing for a fee to be paid to Bayview for the management of Fairview Manor of five percent of the total income of Fairview Development, Inc., with a minimum guarantee of $2,000.00 per month. (TR 25) It should be noted with respect to this, that Nowell's salary was voluntarily discontinued on January 1, 1951, after which time Bayview received considerably less than the amount contracted for. (TR 24-25)

As to these and other "improper" acts, none of these are more than mere allegations as to which the Appellants have had no opportunity to present any kind of defense because said Appellants, by the Court's denial of the motion to vacate the judgment, have been deprived of their opportunity for trial.

XI.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN APPOINTING A RECEIVER FOR FAIRVIEW MANOR. (Point 2)

Concerning the appointment of receivers the following is quoted from American Jurisprudence, V. 45, Receivers:

> "51. *Dissatisfaction, Dissension, Disagreement.* The general rule is that *dissatisfaction of stockholders and dissension and disagreement among stockholders and directors are not in themselves grounds for the appointment of a receiver of corporate property.* Mere differences or disputes as to corporate management, so long as the officers or stockholders do no act that is fraudulent, illegal or ultra vires, will not warrant the intervention of a court of chancery, because in the absence of fraud, illegality or conduct that is ultra vires the will of the majority is entitled to control. . . . *Dissensions between two persons who are equal owners of the stock of a corporation, and are also its officers, will not justify the appointment of a receiver so long as no actual wrong is committed by either of them* . . . However, the courts have been comparatively liberal in the appointment of a receiver of a corporation, even though it is a solvent and going concern, where there are such dissensions among the stockholders, directors or officers that the corporation cannot successfully carry on its corporate functions, imminent danger of loss of assets is threatened and no other remedy appears to be adequate." (Emphasis added)

The plaintiffs, in their complaint, allege various "wrong-doings" on the part of the defendants in sup-

port of their contention that a receiver should be appointed for Fairview Manor from which the Appellants quote.

"VII. That as the apartment units were completed . . . the defendants, Cash Cole and Everett Nowell, acting individually or as officers, directors and stockholders of Bayview Realty, Inc., or both, . . . did wrongfully usurp and take unto themselves, without any authority, possession of the premises and the control of said apartment housing project, collecting the rentals therefrom, controlling the project and disbursing the rentals at will and without accounting to the plaintiffs . . . all without any right or authority whatsoever." (TR 6)

"IX. . . Cash Cole and Everett Nowell . . . have without right or authority paid themselves from the rentals and funds belonging to the plaintiff Fairview Development, Inc., salaries and expenses never approved or authorized by the plaintiff Fairview Development, Inc., or the board of directors of said Fairview Development, Inc. . . . Said salaries and withdrawals have been exorbitant, beyond all proportion to services rendered and without lawful authority or legal right. . . . In addition thereto said defendants, Cash Cole and Everett Nowell, have occupied apartments in said project rent free likewise without any authority or approval . . . Cash Cole and Everett Nowell have further and without any legal right or legal authority paid to themselves . . . large expenses and costs of living for themselves and their families while sojourning beyond the limits of the City of Fairbanks and not in the furtherance of any interest or business of the

> plaintiff Fairview Development, Inc., or said Fairview Manor project . . . Said defendants have failed to account for the funds belonging to the plaintiff corporation . . . or to obtain the approval of said board of directors . . .'' (TR 6-7)

These and other allegations by the plaintiffs have been fully answered and explained by the defendants. The management of Fairview Manor had been entrusted to Bayview Realty, Inc., pursuant to resolution of the Board of Directors of Fairview Development, Inc., of August 3, 1951, (TR 24-25) and by contract between Fairview Development, Inc., and Bayview Realty, Inc., pursuant to said resolution, executed on December 1, 1951.

Plaintiff, Fairview Development, Inc., retained a firm of certified public accountants and one of the members of said firm set up a system of books when Fairview Manor was first opened for occupancy which system has been followed at all times during the intervening period. (TR 26-27) (TR 162-165)

Under the contract of management (TR 25) Bayview, of which Cole and Nowell were the sole owners, was to receive five percent of the total income of Fairview Development Inc., with a minimum guaranty of $2,000.00 per month. Cole and Nowell had managed the project up to January 1953 when drastic economies were deemed necessary. Nowell took other work and has not received any salary since. (TR 28) Cole has managed the property since.

The plaintiffs complain that the defendants have received ''exorbitant'' salaries and that Nowell was

drawing a salary even though he spent his time in other employment. This is completely irrelevant in view of the contract between Fairview and Bayview which provided for a minimum payment of $2,000.00 per month and in view of the fact that the defendants chose, when they deemed it necessary, to reduce this by $1,000.00 per month by discontinuing Nowell's salary.

As for the disbursement of funds, this was, of course authorized by the Board and under the contract, a full accounting was available at all times with respect thereto as the accounts were regularly supervised and audited by a firm of certified public accountants, chosen by the plaintiff corporation. (TR 26-27) (TR 164-165)

Concerning these expenditures Appellant Cash Cole states:

> " . . . That the individual plaintiffs herein, namely Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have, as stated above, individually assumed the liabilities and responsibilities of that certain contract for the construction of the project. That the said three individuals refused and neglected to pay during the construction work on said housing project, although required to do so by the contract herein referred to, interest on the mortgage due January 1, 1952, in the amount of $9,075.26 and thirty days delinquent interest in the amount of $30.25 and interest on mortgage due February 1, 1952, in the amount of $9,194.00; they further refused and neglected to pay real estate taxes levied August 1, 1951, in the sum of $31,612.00 and that due to such neglect and

> failure and refusal of those three individuals to make the required payments, these defendants, as officers, directors, and managers of Fairview Development, Inc., were required to make such payments from the assets of Fairview Development, Inc." (TR 29)

The Appellants further present a detailed description of the violations of the terms and covenants of the contract of construction and of the shortcomings in said construction which necessitated large expenditures in order to render the project fit for occupancy. (TR 103-131) As to the efficiency of management and the necessity of these large expenditures the Appellants refer to the following quotation from a letter from J. F. Campbell, Vice President and Manager of the Mortgage Loan Department of the Seattle Trust and Savings Bank:

> "First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appear staggering at first glance but after my examination of the premises and familiarizing myself with the problems which you have had to face, one cannot help but admire the management's approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project."

These and many other statements by or in behalf of the Appellants, too numerous to quote in detail,

present a clear and unequivocal answer to the vague and unsubstantiated allegations and accusations by the plaintiffs. The fact is that the management of Fairview Manor faced almost insurmountable obstacles due to the failure on the part of the plaintiffs to meet the payments which under the contract it was their duty to meet, and due to the dereliction of duty of said plaintiffs in the construction of the project which the Honorable Judge, in spite of the detailed documentation, calls them "excessive and unreasonable claims". (TR 246)

The Appellants quote further from American Jurisprudence, V. 45, Receivers:

> "52. *Deadlocks.* A deadlock between directors or stockholders in a disagreement as to the affairs of a corporation, does not in itself suffice as ground for a receivership. At least where there is no imminent danger of loss of the corporate property or of any other injury to the moving party which cannot be fully compensated by the final decree, the court will not upon affidavits and in advance of a trial on the merits, by placing the property in the hands of a receiver, wrest the possession of the corporate property from the corporation, and from those officers who are duly elected and who prima facie are entitled to administer the affairs of the corporation. However, dissensions among the stockholders or officers of a corporation as the result of which a deadlock is created and it is unable to successfully carry on the corporate business, have in some cases been regarded as sufficient grounds for the appointment of a receiver."

The main complaint touching upon dissension and disagreement seems to be contained in the plaintiff's statement to the effect that Cash and Nowell, at a meeting on October 29, 1952, allegedly refused to submit certain disputed matters to Kenneth Kadow as provided for by the agreement between the parties. (TR 12-13) For this, Appellant, Cash Cole, offers a perfectly reasonable and adequate explanation which, if given proper weight, clearly shows unreasonable conduct on the part of plaintiff, Cliff Mortensen. Cash Cole states, among other things, as follows:

> "Everett Nowell as president of the corporation sent out notice to the directors of the corporation that a special meeting for the specific purpose of discussing the feasibility of construction of an additional light plant, as the corporation was confronted with problems coming up that winter with reference to the light and electricity. Cliff Mortensen voted 'No' upon the proposed proposition; Cash Cole and Everett Nowell voted 'Yes'. After the matter was discussed, which was the only matter to be discussed in the special meeting, the said meeting was adjourned. Minutes were taken and duly written up and signed by the President and Secretary-Treasurer of the corporation and are part of the records of the corporation. The only reference to Ken Kadow or Roy Sumpter during the meeting was the fact that Cliff Mortensen suggested that the matter should be referred to one of these gentlemen. Cash Cole and Everett Nowell suggested that the matter should be referred to an electrical expert familiar with the conditions at the project. No action was taken. *After the meeting was ad-*

journed further discussion was had during which Cliff Mortensen's attorney, Diamond, who was with him made an accusation concerning Cash Cole of 'milking' the company, whereupon Cash Cole walked out." (TR 31-32) (Emphasis added)

In the present case there was no imminent danger of loss of corporate property or of irreparable damage shown in any manner which would convince the impartial observer, while the Appellants have met these allegations, for which there is no support other than the statements by the plaintiffs themselves, with detailed denials and documentations.

As the following cases clearly hold, the courts will not authorize the appointment of a receiver unless there is imminent danger of loss of corporate property or irreparable damage to the corporation and its stockholders, or where the dissension and deadlock within the board is so serious as to prevent the corporate functions. None of this has been shown by the plaintiffs in any satisfactory manner.

Carey v. Dalgarn Constr. Co. (1930), 171 La. 246, 130 So. 344.

" . . . payment of excessive salaries or commissions, or other grounds for appointment of a receiver, were not shown so as to warrant the appointment. The Court observed that, if the majority stockholders were guilty of paying themselves salaries out of proportion to the services rendered, and had paid themselves illegal commissions *the plaintiff's remedy was a suit to bring such funds back into the treasury of the*

corporation and to prevent future excessive payments by injunction; . . ." (Emphasis added)

And in *Horejs v. American Plumbing & Steam Supply Co.* (1931), 161 Wash. 586, 297 P. 759:

"Illegality of salaries voted to corporation officers held not ground for receivership; stockholders having adequate remedy by action to restrain or recover payments."

The following cases conclusively bear out the contention that there must be clear and convincing evidence pointing to the necessity thereof before an appointment of a receiver may be authorized.

Skirvin et al. v. Coyle et al. Oklahoma, 1939, 94 P 2d 234:

Syllabus of the Court: 1. A minority stockholder has the right to inspect and examine the books and records of his corporation at all reasonable times and such rights should be fully enforced by the courts, *without a general receivership of the corporation.* 2. The exercise of the power to appoint a receiver *should be exercised with extreme caution, and only under circumstances requiring summary relief, or where the court is satisfied that there is imminent danger of loss.*" (Emphasis added)

Peiser et al. v. Grand Isle, Inc. La. 1952, 60 So. 2d 1:

"Courts are slow to interfere with management of the affairs of a corporation in absence of a clear showing of fraud or breach of trust."

The rule that the appointment of a receiver is discretionary and that the power should be exercised only in cases where there is fraud, spoliation or imminent danger of loss of property was applied in *Horejs v. American Plumbing & Steam Supply Co.,* 297 P 759, and in *Kahan v. Alaska Junk Co.* (1920), 111 Wash. 9, 189 P 262, it was held that a minority stockholder of a corporation is not entitled to a receiver because of illegal practices in the conduct of its business until he has exhausted all other remedies, if little prospect of loss of his property rights appears.

Ward v. National Ice Cream Co. et al. (Mo. 1922), 246 SW 554:

"*A receiver will not be appointed for a corporation in doubtful cases,* and fraud or conduct amounting to fraud must clearly appear, and the minority of the stockholders must show it is otherwise remediless." (Emphasis added)

Litz v. S. L. Knitting Co., 80 N.Y. 2d 535:

"A party is not entitled to appointment of temporary receiver *unless his right to such relief is plain from undisputed facts, and if right depends on an issue which can be decided only at trial, relief cannot be granted.*" (Emphasis added)

Accord:

Rabinowitz v. Steinberg, 112 NYS 2d 758.

In the case at hand the plaintiffs have presented only allegations in their complaint and by affidavits as to alleged misconduct and disbursement of assets

without authority on the part of the defendants and with respect to alleged dissensions and deadlock within the corporation and its Board of Directors. These allegations have been clearly and emphatically denied or satisfactorily explained by the Appellants and the Court in its Findings of Fact and Conclusions of Law based thereon has chosen arbitrarily to disregard the Appellants' contentions and their clearly documented evidence to the contrary.

According to the weight of authority mere affidavits on the part of the plaintiffs will not suffice. There must be imposing and persuasive proof:

Gillies v. Pappas Bros. & Gillies Co. (New Jersey, 1946), 47 A 2d 424:

"Chancery Court ordinarily will not appoint a receiver for a solvent corporation upon affidavits the truth of which are (sic) denied in counter affidavits."

Neff v. Progress Bldg. Materials Co. (New Jersey, 1947), 51 A 2d 443:

1. Syllabus of the Court. The appointment of receivers, whether to accomplish a dissolution and liquidation under the authority of the Corporation Act . . . or to serve in a custodial capacity in pursuance of the inherent equitable jurisdiction of this court, *is an important adjudication which is rendered only with supreme caution and upon imposing and persuasive supporting proof.*

2. The appointment of a receiver is not a remedial measure to which an aggrieved litigant is entitled as a strict legal right.

3. The induction of a receiver emanated in a proper case from the exercise of sound legal discretion.

4. The practice of filing a bill assailing the financial stability, credit and prospective responsibility of a corporation without coincidentally submitting the merits of the allegation to the consideration of the Court is disapproved.

5. *The appointment of a custodial receiver is essentially a preliminary injunctive expedient and should not be granted unless such intermediate relief is exigent.* (Emphasis added)

Riddle et al. v. Mary A. Riddle Co. et al. (New Jersey, 1947), 54 A 2d 607:

"On application for custodial receiver of a solvent corporation and a preliminary restraint against its officers and directors on ground of fraudulent violation of trust relationship, *there must appear imposing and persuasive proof, free from doubt, that applicants are entitled to relief requested, and that irreparable injury is impending.*" (Emphasis added)

The Appellants submit that in the case at hand all of the allegations by the plaintiffs were denied and explained in an unequivocal manner in their answer, cross complaint and in their several affidavits as well as in affidavits in their support; that the Court below did not act with "supreme caution" and that the plaintiffs here did not possess any "imposing and persuasive proof"—did, in fact, not present any proof whatsoever; and the Appellants further submit that there was, in the case at hand, no danger whatsoever

of "impending irreparable injury", as Cash Cole was financially responsible and well able to meet any liabilities contingent upon a trial on the merits.

The cases authorizing the appointment of a receiver all show imminent danger to the property of the corporation and clearly disclosed facts producing a conviction on the part of the court that denial of the appointment of a receiver would result in the destruction of the corporation. No such facts are shown in the present case, nor did there, in the case at hand, exist any danger to the existence of the corporation.

> *Wood v. York R. Co.,* 3 F.S. 665:
>
> "Where a stockholder of a railway company brought suit for appointment of a receiver, the court, in overruling a motion to dismiss the bill, and directing the defendant to answer, stated that a receiver might properly be appointed, or other relief afforded the plaintiff, *if, on final hearing, the facts clearly disclosed such mismanagement of the defendant's business and affairs by its board of directors as to produce a conviction that further control of the corporation by the board would result in the destruction of the business and insolvency, or cause great or unnecessary loss to its creditors or stockholders.*" (Emphasis added)

XII.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 13. (Point 7(h))

In its Findings of Fact No. 13 the Court states:

> " . . . the principal defendants could show no ultimate facts, but only a few scattered conclusions of fact and suppositions as follows:"

Whereupon the Court enumerates some of these so called "few scattered conclusions of fact":

> "That plaintiffs 'acting in concert with one W. A. Rushlight' induced him to sign the stipulation, when he did not know the contents thereof: That Cash Cole relied on a false and fraudulent statement as to the contents of said stipulation made by 'A. G. Rushlight Co.' "

The Appellants contend that the part played in the conspiracy by W. A. Rushlight has been clearly shown by said Appellants. The circumstances under which W. A. Rushlight obtained the signature of Cash Cole on the stipulation, the note to Rushlight and the agreement with Nowell have been dealt with in Appellants' contentions Nos. I, II, and III and elsewhere, supra.

The motion to set aside the judgment and the several affidavits by or in behalf of the Appellants all show how Cash Cole was duped into signing these documents while he was under the care of a physician, suffering from a severe heart attack and unable to read or to comprehend.

It is noteworthy that the plaintiffs have not attempted to offer any medical testimony of their own

to the contrary. The Honorable Judge states in his Findings of Fact No. 12:

> "Dr. Joseph M. Ribar attended Cash Cole following his purported heart attack at the end of the first day of the trial. The doctor merely stated that at no time within one week after said attack was Cash Cole in a proper physical or mental condition to transact business matters and admitted that he was unable to state as to whether Cash Cole was mentally competent to transact any business matters after the expiration of 72 hours following his attack, that is, after October 7, 1954 (sic), since the patient was not examined to determine his mental competency. . . ." (TR 238)

The Honorable Judge seems to rely on the apparent discrepancy in this statement; but be it as it may, it has been conclusively shown that Cash Cole was a very sick man and in the first affidavit by Dr. Ribar the following statement is of importance and should, regardless of other considerations, settle the question as to Cash Cole's condition:

> ". . . that affiant made several calls on Cash Cole during the *following week and found that the patient was slowly recovering his strength and that he was regaining his vision,* although *he was still a very sick man.* . . ." (TR 65) (Emphasis added)

That, the Appellants submit, was one week after the heart attack and several days after the execution of the stipulation and accompanying documents.

The Honorable Judge further states, in Findings of Fact No. 12, that the affidavits submitted in behalf of the defendants contain conflicting statements as to Cash Cole's comprehension and capacity. These statements, with the exception of that of Dr. Ribar, were given by laymen and their opinion as to the length of time during which Cash Cole was unable to read or to comprehend would naturally vary somewhat. These statements, however, are all in accord in their conviction that Cash Cole was unable to read or to comprehend during the crucial period of the negotiations and until after he had executed the documents. Consequently any discrepancy in this respect is of no importance whatsoever and does not, in any way weaken the testimony.

The Honorable Judge further states, in Findings of Fact No. 13 that the demand note to Rushlight and the agreement with Nowell had no place in the stipulation. (TR 240) True, these documents were not directly a part of the stipulation, but they were so intimately connected therewith that it is reversible error to disregard them. It is claimed by the Appellants, and ample proof thereof has been submitted, that the stipulation was obtained by fraud and conspiracy and that the obtaining of the note by Rushlight and of the agreement by Nowell were the means by which these former friends of Cole whom he trusted, were induced to act to his detriment. These matters have been dealt with in Appellants' contention No. III.

The Honorable Judge even goes so far in his effort to discredit the Appellants that he stresses what is obviously a mere typographical error as a "discrepancy", to wit, the substitution of "A. G. Rushlight Co." for W. A. Rushlight (TR 240) which appears in Cole's affidavit. (TR 57)

As to the reason for the scheme, as claimed by Cash Cole:

> ". . . to secure not only the profits from contracts of construction, but also over $1,000,000.00 by failing to do the work, etc.;" (TR 240)

The statements pertaining thereto have been amply documented in the cross complaint (TR 103-131) and in the Appellants' affidavits.

Concerning the plaintiffs' statements on the other hand, the Honorable Judge states as follows:

> ". . . The other parties to the negotiations deny any such conspiracy, fraud or other charges and in their affidavits set up the ultimate facts leading up to the settlement and said stipulation as hereinabove indicated." (TR 240)

The Appellants contend that all the plaintiffs have set up are mere denials and allegations without any proof whatsoever.

The Honorable Judge further seems to place great importance on statements by the plaintiffs to the effect that said plaintiffs were willing to buy the interests of the principal defendants and settle all claims

on the same terms and conditions as those contained in the final settlement agreement contained in the stipulation. (TR 240-241)

The statement to this effect by the plaintiffs should be given no weight whatsoever. Obviously, the deal could, by the very nature of things, not have been reversed "on the same terms" and further, there appear no documents, no written memorandum as to these purported terms and we have nothing on which to rely as to the truth of this statement but the plaintiffs' bland statement itself.

In this respect it should be noted that instead of the yearly payments offered to Cash Cole should he decide to buy from the Mortensen group, the stipulation provided that Cash Cole would be in default within three (3) months time and that the Mortensen group could then take over immediately.

XIII.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS CONCLUSIONS OF LAW. (Point 7(g))

The Honorable Judge states, in his Conclusions of Law, No. 1—the defendants have failed to sustain any grounds under Rule 60 (b) of the Federal Rules of Civil Procedure on which the court can set aside or rescind the stipulation or vacate the final judgment based thereon. (TR 248)

This has been discussed in Appellants' contention No. I, supra. The following cases further support the Appellants' contention that the Court erred in so ruling:

Assman v. Fleming, 159 F 2d 332:

". . . The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles."

Washington v. Sterling, 90 A 2d 836.

Hall v. McConey, 132 SW 618:

"The trial court's discretion in passing on a motion to set aside a default judgment is not arbitrary or capricious, *but is judicial and must be exercised upon definite facts from which legal inferences result."* (Emphasis added)

The conclusion that there is no "clear, unambiguous and convincing proof" of fraud or conspiracy or "any of the other acts charged in the motion" is reversible error in view of the analysis presented by the Appellants in the preceding paragraphs. (TR 248-250)

The conclusion that the Mortensen group has completed performance of the terms and conditions set forth in the stipulation and that it would therefore, be inequitable to rescind the stipulation and set aside the judgment is also reversible error in view of the evidence as set forth above, and in view of the fact that there was still no adequate consideration as the Mortensen group had done nothing which they were

not already obligated to do and for which they were not already liable.

The conclusion that Cash Cole has ratified and affirmed the settlement by failing to disaffirm without delay (TR 250) is error because the evidence shows that, even if Cash Cole were able to read within a short time after he had been induced to execute the stipulation and other documents, he was still a very sick man for a very long time thereafter.

Further, the Appellants have one year under Rule 60 (b) within which to file the motion.

Concerning the cross-complaint filed by the defendants, (TR 250) the dismissal of Cause No. 3532 would not prejudice the defendants in the present cause as Nelse Mortensen Alaska Co. is not a party to this action; and further that the plaintiffs instituted the present action and the Appellants are entitled, under Rule 60 (b), Federal Rules of Civil Procedure, under the circumstances as analyzed above, to have this controversy tried on the merits and to file a cross-complaint.

The Honorable Judge, finally, as a result of these erroneous findings and conclusions, arrives at the conclusion (TR 251) that Cash Cole, as a consequence of having defaulted on a contract the performance of which was well known by all parties to be impossible, must turn over all of his interest in Fairview Development, Inc. and Fairview Manor to the Mortensen group. It is strangely ironic that the Honor-

able Judge here states that Roy Sumpter of Seattle, Washington, should be directed "to endorse and/or deliver to said individual plaintiffs the certificate or certificates of stock of Fairview Development, Inc."; thus recognizing the impossibility on the part of Cole to deliver this stock in escrow as per the stipulation, inasmuch as he did not have possession and was kept from possession of this stock by the attorneys for the plaintiffs, (TR 135-136) while the Honorable Judge, at the same time states in his Findings of Fact No. 20 (TR 245) that Cole and Nowell have defaulted under the stipulation in this respect.

The clause, contained in the stipulation and agreement, that the Mortensen group might, upon default, immediately declare the full balance due and require the escrow holder to deliver the stock to them as their property (TR 39) cannot be deemed liquidated damages but must be considered a penalty; particularly in view of the fact that performance under the stipulation was impossible and that this impossibility of performance was well known to all parties concerned and must now be recognized by any unbiased observer.

Concerning penalties as opposed to liquidated damages the Appellants quote from McCormick on the Law of Damages (1935) Chapter 24, page 599:

> *Liquidated Damages and Penalties defined and distinguished:*
>
> "Paragraph 146 . . . If it is determined that the amount was fixed in good faith as an estimate by the parties of the probable injury to be suf-

fered from a breach, then it will be denominated 'liquidated damages' and the agreement will be enforced; but if the court finds that it was not such a pre-estimate, *but was fixed merely as a deterrent to prevent a breach, it will be termed a penalty and the agreement will not be enforced.*" (Emphasis added)

It is thus manifest that the Court erred twofold with respect to his Findings of Fact and Conclusion of Law No. IX. First, in his denial of the defendants' motion to set aside the judgment under Rule 60 (b) Federal Rules of Civil Procedure on the ground of fraud which has been amply proved by the evidence; and second, because this clause of forfeiture must, in view of the established facts as analyzed herein, be considered a penalty and not liquidated damages.

CONCLUSION.

In conclusion we must say that there are no authorities that we have ever known that will justify a vengeance being heaped upon a good citizen as has been done in this case against Cash Cole. Without a trial he has been deprived of his livelihood, and in many instances without the slightest degree of evidence has suffered a Finding against him. He has been dispossessed and moved out of his property when the cross complaint shows that the plaintiffs in the case below are indebted to him and to his com-

pany in many thousands of dollars. It appears to us to be an effort to prevent a thorough and complete trial, as well as to deprive Cash Cole of the job of managing the apartments that he was so successfully doing, and to place a receiver in the property over and against the interests of the one and only person who is entitled to the possession thereof. The evidence of the defendants based upon the affidavits filed herein, most of which were never even denied, shows conclusively a very effective management on the part of Cash Cole. There is not a scintilla of evidence of any dishonesty on his part or any arbitrary abuse of the plaintiffs in this action. It was never intended by the law or equity that plaintiffs could come into court and in such a high-handed method without a trial defeat justice as has been done here. The plaintiffs are in possession of the property now by reason of various orders made by the trial judge in the case below and will surely slip by and defeat their many just debts if this proceedings should be upheld.

Without the plaintiffs using a word of competent testimony on their behalf, they have taken this property away from Cash Cole, have broken their contract of management thereof, have browbeaten him by forcing him by an order of the court to move out of the premises, have taken his corporate stock without a trial; and sincerely we can think of no case anywhere, where such a high-handed method has gone unnoticed and has not been corrected by an Appellate Court when the same is properly put before it. We still have faith in the constitution and laws of the

United States and with confidence we trust that this Honorable Court will correct this tragedy, and humbly submit this, our Brief.

Dated March 4, 1955.

Respectfully submitted,

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